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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RONALD HOGAN, et al., Plaintiffs and Respondents, v. DEANGELIS CONSTRUCTION, INC., et al., Defendants and Appellants.	A138118 (Sonoma County Super. Ct. No. SCV 230846)

This is our third opinion in this case, which arises out of Ronald and Victoria Hogan's rescission of a May 2000 contract to purchase a home on Gardenview Place in Santa Rosa. In our first opinion, *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A117321, A118257, A120840, May 20, 2009) [nonpub. opn.] (*Hogan I*), we ruled that a portion of the damages award against the developers of the property was duplicative and instructed the trial court to strike that portion of the damages award from the post-trial judgment. In our second opinion, *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A128451, A130351, April 18, 2012) [nonpub. opn.] (*Hogan II*) we affirmed the trial court's denial of the Hogans' motion to enforce liability against the developers' appellate bond and increase the amount of the bond, which was posted by the developers in connection with *Hogan I*. We also awarded the developers their costs on appeal.

Following our remand in *Hogan II*, the developers filed a motion in the trial court to recover the attorney fees they incurred on appeal in *Hogan II*, and submitted a separate memorandum of costs to recover their costs on appeal in *Hogan II*. In a written order

dated December 31, 2012, the trial court denied the developers' motion for attorney fees and taxed $11,828 in costs.

The developers now argue in this appeal that the trial court erred in denying their motion for attorney fees and in taxing $11,828. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following background is derived primarily from our lengthy opinions in *Hogan I* and *Hogan II*. We recite only those facts that are germane to this appeal.[1]

The Purchase Agreement and Pre-trial Proceedings

In May 2000, the Hogans—plaintiffs below and respondents in this appeal—entered into an agreement to purchase the Gardenview property from defendants/appellants DeAngelis Construction, Inc., Marvin DeAngelis, DeAngelis Pope Homes, and Gary Pope (the Developers). In August 2002, the Hogans commenced this action, alleging several causes of action against the Developers, including mutual mistake and intentional fraud. With regard to the claims based on mistake and fraud, the Hogans alleged grounds to support their unilateral rescission of the Gardenview purchase agreement and also sought relief based on that rescission.[2]

During pretrial proceedings, the Developers conceded that the Hogans' rescission was valid and offered to restore their consideration. On May 17, 2004, the trial court issued an order affirming the rescission (the May 2004 rescission order). The court determined, however, that rescission could not be enforced against the Hogans until there was a trial on their claim for damages.

At a December 14, 2006 pretrial hearing, the trial court advised the parties of its intention to issue a "conditional" judgment effectuating rescission of the purchase agreement. That same day, the court filed a "conditional judgment" (the December 2006

[1] We filed a fourth opinion in this case on the same day we issued this opinion. (See *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A143637, Jan. 13, 2016) [nonpub. opn.] (*Hogan IV*).) The circumstances of *Hogan IV* are not relevant to this appeal.

[2] The Hogans also named as defendants the real estate agents for the sale, Clayton and Mary Engstrom (the Realtors). The Realtors are not parties to this appeal.

conditional judgment) directing that (1) the Gardenview property deed was to be reformed and title was to be returned to the Developers; (2) the Hogans were to vacate the Gardenview property and restore possession to the Developers by February 1, 2007; (3) "Defendants are to return consideration paid by [the Hogans] of $606,245.00" no later than January 15, 2007; and (4) both the return of consideration to the Hogans and of the real property to the Developers was "without prejudice to each side to pursue its claims against the other."

Trial and Post-trial Proceedings

A jury trial commenced in February 2007. The jury findings established that the Hogans' damages in connection with the rescission were $792,688, less total offsets in the amount of $458.229.[3] The Hogans were thus entitled to a net award of $334,459 against the Developers in connection with the rescission. The net award included $252,000 for the Hogans' down payment; the remainder was for consequential damages and interest. The jury also made findings as to the Hogans' three remaining causes of action, including that the Developers failed to disclose material facts to the Hogans, which caused an additional $115,800 in damages. In balancing the equities, the jury found that the Developers were to assume the balance of the mortgage obligations on the Gardenview property. A judgment on the special verdicts was filed on March 22, 2007 (the March 2007 judgment).

The Developers subsequently moved for judgment notwithstanding the verdict. One of their arguments was that the jury miscalculated the interest component of the Hogans' monetary recovery. The trial court granted this portion of the Developers' motion. It then issued an amended judgment on June 6, 2007 (the June 2007 amended judgment), providing that the Hogans shall recover judgment against the Developers in the amount of $394,246.41. This amount included the Hogans' recovery arising from the rescission as well as their recovery of $115,800 for intentional concealment damages.

[3] The offsets mainly consisted of fair rental value of the property, interest on the fair rental value, and an increase in a mortgage obligation attributable to the Hogans' refinancing.

The judgment also provided that the Developers "shall pay the existing mortgage debt in the amount of $417,000.00," and required the Hogans to return the Gardenview property to the Developers. In all other respects, the June 2007 amended judgment "incorporate[d] by reference [the] court's Judgment on Special Verdict filed March 22, 2007."[4]

Hogan I

Following entry of the June 6, 2007 amended judgment, the parties filed an array of appeals and cross-appeals. In connection with these appeals, the Developers posted an appellate bond in the amount of $591,370 to stay enforcement of the June 6, 2007 amended judgment.

We resolved the appeals and cross-appeals in May 2009 in *Hogan I*. Among the issues we decided was the Developers' cross-appeal challenging the $115,800 damages award for intentional concealment. We held that the intentional concealment damages award was duplicative of the recovery arising from the rescission and remanded the case with instructions to strike the intentional concealment damages award. (*Hogan I*, 2009 WL 1398646, at pp. *31, 35.) This court issued a remittitur on August 31, 2009.

Post-Hogan I Proceedings

On April 20, 2010, the trial court filed an order modifying the June 2007 amended judgment in accordance with our remand instructions in *Hogan I* (the April 2010 modified amended judgment). The April 2010 modified amended judgment struck the intentional concealment damages award of $115,800 against the Developers, and reduced the amount of recovery from the Developers to $278,446.97. The April 2010 modified amended judgment also stated that the Developers must "remove as an obligation of the Hogans" the $417,000 mortgage debt. The final paragraph of the April 2010 modified amended judgment stated: "In all other respects, the June 6, 2007 amended judgment remains the same."

[4] The June 2007 amended judgment also provided that the Hogans were to recover additional damages from the Realtors, but these are not relevant to this appeal.

On May 5, 2010, the Hogans filed a motion to correct or vacate the April 2010 modified amended judgment. They argued, among other things, that the April 2010 modified amended judgment should be corrected to award them interest on their money damages accruing from the entry of the jury verdicts. At a July 2, 2010 hearing, the trial court denied the Hogans' motion, stating that "no interest starts accruing until the money payment becomes due and, at least with respect to the [Developers], the payment is not due until Plaintiffs tender return of the house," which the Hogans had not yet done.

On July 23, 2010, the Hogans filed a motion in this court to recall the August 31, 2009 remittitur from *Hogan I*. We denied that motion on August 17, 2010.

Three days later, on August 20, 2010, the Hogans filed a motion to enforce liability against the Developers' appellate bond and increase the amount of the bond, despite the fact that we reduced the damages award against the Developers by $115,800 in *Hogan I*. The Hogans' motion cited almost a dozen code provisions but relied primarily on provisions of the Bond and Undertaking Law appearing in Title 14, Chapter 2 of the Code of Civil Procedure (§ 995.010 et seq.).[5] We previously noted in *Hogan II* that "[t]he calculations that the Hogans made to support this claim were not sufficiently coherent for us to repeat," but we believed their analysis was based on the following assumptions: (1) the Developers were jointly and severally liable for a $602,000 cost judgment allegedly entered against the Realtors; (2) the Developers' liability increased to include accrued interest on the unpaid money judgment; (3) the Developers were liable for additional damages that the Hogans allegedly incurred since entry of the original judgment. The trial court denied the Hogans' motion at an October 22, 2010 hearing.[6]

On November 8, 2010, the Developers made a demand for acknowledgment of satisfaction of judgment on the Hogans pursuant to section 724.050.[7] The demand

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[5] All further undesignated statutory references are to the Code of Civil Procedure.

[6] At the October 22 hearing, the trial court also granted a motion by the Developers to reduce the amount of their appellate bond.

[7] Section 724.050, subdivision (a) states: "If a money judgment has been satisfied, the judgment debtor, the owner of real or personal property subject to a judgment lien

included a photocopy of a check payable to the Hogans for $12,210.49, which the Developers claimed was for full satisfaction of the judgment. The demand was "made on the grounds that the [April 20, 2010] modified amended judgment . . . requires you to tender the house in exchange for monies due for performance of rescission and that you have refused to tender the house thereby preventing performance thereby entitling defendants 'to all the benefits which he [sic] would have obtained if it had been performed by both parties,' a full satisfaction of judgment."

On November 15, 2010, the Hogans filed a notice of appeal from several of the trial court's post-*Hogan I* orders, including the July 2, 2010 order denying the Hogans' motion to award them interest on their money damages, and the October 22, 2010 order relating to the Developers' appellate bond.

Approximately one week later, the Hogans filed objections in the trial court to the Developers' section 724.050 demand for acknowledgement of satisfaction of judgment. The Hogans claimed that the Developers' demand was automatically stayed pending their appeal. They also contended that the Developers were not entitled to an acknowledgement of satisfaction of judgment because they had not paid anything to the Hogans, and that the $12,210.49 photocopy of a check attached to the Developers' demand "does not remotely come close to satisfying the judgment" against the Developers.

Hogan II

We resolved the Hogans' appeal from the trial court's July 2, 2010, and October 22, 2010, orders (as well as their appeals from other trial court orders) in *Hogan II*, rejecting each of their grounds for appeal. We affirmed the trial court's July 2010 order denying the Hogans interest on their money damages, stating that "although the modified

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created under the judgment, or a person having a security interest in or a lien on personal property subject to a judgment lien created under the judgment may serve personally or by mail on the judgment creditor a demand in writing that the judgment creditor do one or both of the following: [¶] (1) File an acknowledgment of satisfaction of judgment with the court. [¶] (2) Execute, acknowledge, and deliver an acknowledgment of satisfaction of judgment to the person who made the demand."

judgment allows the Hogans to recover consequential damages relating to the rescission, those monies are not due unless and until the Hogans return the Gardenview property to the Developers." We affirmed the portion of the trial court's October 22, 2010 order denying the Hogans' request to enforce the appellate bond against the Developers because "their theory rests on the false premise that they are entitled to recover their consequential damages without having to return the Gardenview property to the Developers." We also affirmed the portion of the October 22, 2010 order denying their request to increase the Developers' appellate bond because it was based on their erroneous belief that the Developers liability to the Hogans included (1) post judgment interest, (2) the $417,000 mortgage obligation for the Gardenview home, or (3) other post judgment expenditures. The disposition portion of *Hogan II* stated: "*Costs* are awarded to the . . . Developers in this appeal." (Emphasis added.)

The Developers' Motion for Attorney Fees and Memorandum of Costs

After this case was remanded following *Hogan II*, the Developers moved to recover attorney fees they incurred on appeal in *Hogan II*. Their theory for recovering attorney fees was (and continues to be) convoluted and confusing. Their motion stated that it was brought pursuant to three statutes: sections 685.040, 724.070, and 996.030. Their supporting memorandum concocted a theory for recovery of attorney fees that cited other statutes, as well. As far as we can tell, the Developers argued that the Hogans, by unsuccessfully moving to enforce and increase the Developers' appellate bond and then objecting to the Developers' section 724.050 demand for acknowledgement of satisfaction of judgment, were seeking more money from the Developers than they were entitled to recover under the final judgment. As such, the Hogans were liable to them for damages under section 724.070, subdivision (a), which provides: "If a judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment upon the performance of any act or the payment of an amount in excess of that to which the judgment creditor is entitled under the judgment, the judgment creditor is liable to the judgment debtor for all damages sustained by reason of such action or two hundred fifty dollars ($250), whichever is the greater amount." The Developers contended that

because the Hogans were liable under section 724.070, they were also required to pay the Developers' attorney fees pursuant to section 724.080, which provides: "In an action or proceeding maintained pursuant to this chapter, the court shall award reasonable attorney's fees to the prevailing party."

The trial court denied the motion for attorney fees in a detailed written order filed December 31, 2012. The trial court's order described the Developers' demand for acknowledgment of satisfaction of judgment under section 724.050 and the Hogans' objections thereto. Citing section 724.070, the trial court concluded: "The Hogans were not 'intentionally' demanding payment or performance 'in excess of that' to which they were entitled. Although the Hogans may have been demanding that [the Developers] pay all the damages awarded to them, plus the reimbursement for the property, before entering satisfaction of judgment or returning the property, that is not 'in excess' of what was owed to them. Even if the Hogans were entitled [sic] to return the subject property before receiving full payment of damages, they were not obligated to execute a full satisfaction of judgment."

The Developers also sought to recover their costs incurred on appeal in *Hogan II*. Their Memorandum of Costs on Appeal filed with the trial court totaled $38,936. Of that amount, $5,914 was listed as "Premium on Surety Bond" from August 24, 2009 to August 24, 2010. An additional $5,914 was listed as "Expenses Necessary to Secure Bond," which was described as a cost for obtaining a letter of credit from August 24, 2009 to August 24, 2010. The Hogans moved to strike and/or tax the Developers' memorandum of costs. Among their many arguments was that the costs for the bond premium and letter of credit from August 24, 2009 to August 24, 2010, should be taxed because they predated the notice of appeal in *Hogan II*, which was not filed until November 2010.

The trial court granted the Hogans' motion in part in the same December 31, 2012 order denying the Developers' motion for attorney fees. The trial court stated in pertinent part: "The court grants the Hogans' motion to tax those costs for the premium on the surety bond during the period August 24, 2009 through August 24, 2010. In addition, the

court grants the motion as to the expenses necessary to secure the bond in connection with the period August 24, 2009 through August 24, 2010. This combined amount, to be subtracted from the cost bill, amounts to $11,828.00. The remaining costs are determined to be reasonable and proper as described in [the Developers'] Memorandum of Costs on Appeal."

The Developers timely appealed the portions of the December 31, 2012 order denying their motion for attorney fees and granting in part the Hogans' motion to strike/tax their costs on appeal in *Hogan II*.

DISCUSSION

A. *Motion for Attorney Fees on Appeal*

The Developers argue that the trial court erred in denying their motion to recover attorney fees incurred in connection with *Hogan II*.

Unless an appellate court orders otherwise, an award of costs on appeal neither includes attorney fees on appeal nor precludes a party from seeking them from the trial court. (Cal. Rules of Court, rule 8.278(d)(2).) Thus, "a decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney fees on appeal." (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 927.) "[T]o collect appellate attorney fees, a party must demonstrate the right to do so under either a statute or a contract, independent of a costs statute." (*Ibid.*) Ordinarily, we review a trial court's order regarding attorney fees for abuse of discretion. However, our review is de novo where, as here, "the determination of whether the criteria for an award of attorney fees . . . have been satisfied amounts to statutory construction and a question of law." (*Carver v. Chevron U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 142.)

The Developers' motion for attorney fees was made pursuant to sections 685.040, 724.070, and 996.030. It also relied heavily on section 724.080. As we explain below, none of these statutes allow the Developers to recover the attorney fees they incurred in connection with the appeal in *Hogan II*.

1. *Section 685.040*

Section 685.040 states: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment." Section 685.040 does not permit the Developers to recover attorney fees because they are not the judgment creditor in this case. They are the judgment debtor.

2. *Section 724.070*

Section 724.070 states: "If a judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment upon the performance of any act or the payment of an amount in excess of that to which the judgment creditor is entitled under the judgment, the judgment creditor is liable to the judgment debtor for all damages sustained by reason of such action or two hundred fifty dollars ($250), whichever is the greater amount." (§ 724.070, subd. (a).)

The Developers argue that section 724.070 is applicable in this case because the Hogans, by unsuccessfully moving to enforce and increase the Developers' appellate bond, were "intentionally condition[ing] delivery of an acknowledgment of satisfaction of judgment upon the performance . . . or payment of an amount in excess of that to which the judgment creditor is entitled." We disagree. We do not see how the Hogans' motion to enforce and increase an appellate bond was connected to a conditional delivery of an acknowledgement of satisfaction of judgment under section 724.070. The Hogans' motion did not purport to be a conditional delivery of an acknowledgment of satisfaction of judgment under section 724.070. Instead, it was a motion to enforce and increase the Developers' appellate bond that was brought under provisions of the Bond and Undertaking Law.[8]

[8] Although the Developers' reliance on section 724.070 is befuddling to us, the trial court conducted an analysis under section 724.070 and concluded that "[t]he Hogans were not 'intentionally' demanding payment or performance 'in excess of that' to which they were entitled." Since we conclude that section 724.070 has no applicability whatsoever, we need not decide whether the trial court correctly determined that the Hogans were not "intentionally" demanding more than they were entitled to under section 724.070. Nor is this opinion intended to express any views about this issue. Of course,

3. *Section 724.080*

Section 724.080 states: "In an action or proceeding maintained pursuant to this chapter, the court shall award reasonable attorney's fees to the prevailing party." "[T]his chapter" refers to Title 9, Division 5, Chapter 1 of the Code of Civil Procedure, entitled "Satisfaction of Judgment."

At oral argument, we pressed the Developers' counsel to identify an "action or proceeding maintained pursuant to this chapter" that would permit the Developers to recover attorney fees under section 724.080. Counsel responded by identifying the Hogans' motion to enforce and increase the Developers' appellate bond, as well as the Developers' motion to reduce the amount of the bond. As we just explained, we do not see how the Hogans' motion to enforce and increase the bond falls within this statute. The same is true with respect to the Developers' motion to reduce the bond.

In their appellate brief, the Developers also argued that their demand for acknowledgment of satisfaction of judgment under section 724.050 "triggered an action or proceeding under section 724.080." Their argument has no merit because although the section 724.050 demand was a proceeding pursuant to "this chapter," the Developers were not a "prevailing party" with respect to the demand, which they must be in order to recover attorney fees under section 724.080. A section 724.050 demand is part of a statutory scheme relating to the satisfaction of a judgment that entails making a demand for acknowledgment of satisfaction of judgment (§ 724.050, subd. (a)), moving for an order to comply with the demand in a noticed proceeding (§ 724.050, subd. (d)), proving up that the judgment creditor conditioned an acknowledgment on payment of an amount in excess of that to which the judgment creditor is entitled under the judgment (§ 724.070, subd. (a)), and then seeking attorney fees as the prevailing party in the proceeding (§ 724.080). The record only shows that the Developers made a demand

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even though our analysis differs from the trial court's, we may affirm its order denying attorney fees on a different theory because "[w]e do not review the trial court's reasoning, but rather its ruling." (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.)

under section 724.050 and that the Hogans objected to it. No further action was taken after the Hogans' objection. Therefore, there is no basis to conclude that the Developers were the "prevailing party" with respect to their section 724.050 demand. (§ 724.080.) Since they were not the "prevailing party" in that proceeding, they cannot recover attorney fees under section 724.080.

The Developers' attempt to recover attorney fees under section 724.080 fails for a separate reason. Section 724.080 allows for the recovery of attorney fees in an action or proceeding that relates to the satisfaction of a judgment. The Developers, however, are asking for attorney fees they incurred in a completely different proceeding—the appeal in *Hogan II*. That appeal involved a litany of issues, none of which related to the satisfaction of a judgment. The incongruity between the attorney fees sought by the Developers and the statute they are seeking them under is, by itself, reason to deny their motion for attorney fees.

The Developers rely on another statute—section 720.710—in arguing they are entitled to attorney fees under section 724.080. The Developers' argument on this point is confusing and incoherent, although we need not attempt to repeat the argument because section 720.710, on its face, is inapplicable to this matter. Section 720.710 states: "The Bond and Undertaking Law (Chapter 2 (commencing with Section 995.010) of Title 14) applies to a bond given pursuant to this title [Title 9], except to the extent this title prescribes a different rule or is inconsistent." Section 720.710 says nothing about the applicability of section 724.080. It addresses the applicability of the Bond and Undertaking Law, which appears under a different title in the Code of Civil Procedure—Title 14—than section 724.080, which appears under Title 9.

4. *Section 996.030*

Section 996.030 states that a court "may determine that the amount of the bond is excessive and order the amount reduced to an amount that in the discretion of the court or officer appears proper under the circumstances." (§ 996.030, subd. (a).) The Developers cannot recover attorney fees on appeal pursuant to section 996.030 because the statute does not address the recovery of attorney fees at all.

To summarize, the Developers have not demonstrated their right to recover the attorney fees they incurred in connection with *Hogan II*. The trial court did not err in denying their motion for attorney fees.

B. *Costs on Appeal*

The Developers argue that the trial court erred by not awarding them $11,828 for the cost of the premium and letter of credit for their appellate bond for August 2009 to August 2010 as costs on appeal in *Hogan II*. The Developers acknowledge that these costs were incurred before a notice of appeal in *Hogan II* was filed. Nevertheless, they contend the costs are recoverable as a "continuation of the appellate proceedings of *Hogan I*." According to the Developers, "the appellate proceedings [related to *Hogan I*] had not terminated by August 24, 2009, prior to when the remittitur was issued, and in fact the Hogans after the August 31, 2009 remittitur was issued, attempted to revive those appellate proceedings prior to August 23, 2010, the end of the bond's annual term. Under these circumstances, as a matter of law, it was prejudicial error to deny [the Developers] bond costs incurred prior to the issuance of the remittitur and while the Hogans sought to recall of the remittitur [sic] in July and August 2010, when [the Developers were] required as a matter of law to continue to have the bond posted."

California Rules of Court, rule 8.278 states that "the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal." (Cal. Rules of Court, rule 8.278(a)(1).) Recoverable costs on appeal include "[t]he cost to procure a surety bond, including the premium [and] the cost to obtain a letter of credit as collateral . . . ." (Cal. Rules of Court, rule 8.278(d)(1)(F).) Because the Developers' right to costs turns on the construction of rule 8.278, our review is de novo. (*In re Daniel M.* (1996) 47 Cal.App.4th 1151, 1154 [interpretation of rules of court are reviewed de novo].)

The Developers were not entitled to recover bond costs from August 2009 to August 2010 under rule 8.278 because the costs were not incurred as a part of *Hogan II*. The plain language of rule 8.278 states that a prevailing party on appeal "is entitled to *costs on appeal*." (Cal. Rules of Court, rule 8.278(a)(1), emphasis added.) Consistent

with rule 8.278, our opinion in *Hogan II* stated that "[c]osts are awarded to the . . . Developers in *this appeal*." (Emphasis added.) By the Developers' own admission, the bond costs incurred for August 2009 to August 2010 predated the appeal leading to *Hogan II* and were instead related to proceedings from *Hogan I*. The Developers have cited no authority allowing them to recover those costs as "costs on appeal" under rule 8.278 when they were incurred in connection with a separate appeal.

The Developers also argue that it "was prejudicial error to deny [the Developers'] bond costs incurred while the Hogans continue to refuse to perform in violation of section 724.070." This argument is without merit because, as we explained, the Developers have not shown that section 724.070 applies to this matter.

Accordingly, the trial court did not err in taxing the Developers' bond costs of $11,828 from August 2009 to August 2010.

DISPOSITION

The appealed portions of the trial court's December 31, 2012 order are affirmed. The parties shall bear their own costs on this appeal.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

A138118, *Hogan, et al. v. DeAngelis Construction, Inc., et al.*